

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS		DEFENDANTS																																																																																												
<p>(b) County of Residence of First Listed Plaintiff _____ <i>(EXCEPT IN U.S. PLAINTIFF CASES)</i></p> <p>(c) Attorneys (Firm Name, Address, and Telephone Number)</p>		<p>County of Residence of First Listed Defendant _____ <i>(IN U.S. PLAINTIFF CASES ONLY)</i></p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys (If Known)</p>																																																																																												
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VII. REQUESTED IN COMPLAINT:		<input type="checkbox"/> CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.	DEMAND \$ _____	CHECK YES only if demanded in complaint: JURY DEMAND: <input type="checkbox"/> Yes <input type="checkbox"/> No																																																																																										
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INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
 - (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
 - (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 - United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 - United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 - Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 - Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
 - Original Proceedings. (1) Cases which originate in the United States district courts.
 - Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 - Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 - Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 - Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 - Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 - Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 - Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

Of Counsel:
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A Law Corporation

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Telephone: (808) 531-8031

Facsimile: (808) 533-2242

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

KOKUA COALITION, a Hawaii non-) CIVIL NO. _____
profit corporation, dba HAWAII)
VACATION RENTAL OWNERS) **COMPLAINT; SUMMONS**
ASSOCIATION,)
)
Plaintiff,)
)
vs.)
)
DEPARTMENT OF PLANNING AND)
PERMITTING OF THE CITY AND)
COUNTY OF HONOLULU; CITY)
AND COUNTY OF HONOLULU;)
GEORGE ATTA; HONOLULU)
ZONING BOARD OF APPEAL,)
)
Defendants.)
)

COMPLAINT

Plaintiff KOKUA COALITION, a Hawaii nonprofit corporation doing business as HAWAII VACATION RENTAL OWNERS ASSOCIATION (“Plaintiff”), by and through its attorneys, Damon Key Leong Kupchak Hastert, and for causes of action against Defendant City and County of Honolulu, Defendant Department of Planning and Permitting, City and County of Honolulu, Director George Atta, and the Honolulu Zoning Board of Appeals (“Defendants”), alleges and avers as follows:

NATURE OF ACTION AND JURISDICTION

1. Plaintiff is and was at all relevant times a Hawaii nonprofit corporation with its principal place of business in the City and County of Honolulu, State of Hawaii, whose purpose is to lobby and educate government officials, property owners, vendors and the general public about the vacation rental industry, and to advocate for its members and similarly situated property owners who do, or desire to, rent all or portions of their properties to guests for compensation in compliance with the law.

2. This is a civil action under 42 U.S.C § 1983 seeking declaratory judgment and injunctive relief against Defendants for committing acts, under color of law, with the intent and for the purpose of depriving Plaintiff of rights secured under the Constitution and laws of the United States; retaliating against Plaintiff’s

members for their exercise of constitutionally protected rights; and for refusing or neglecting to prevent such deprivations and denials to Plaintiff's members.

3. This case arises under the United States Constitution and 42 U.S.C. Sections 1983 and 1988, as amended. This Court has jurisdiction in this matter pursuant to 28 U.S.C. Sections 1331 and 1343. The declaratory and injunctive relief sought is authorized by 28 U.S.C. Sections 2201 and 2202, 42 U.S.C. Section 1983 and Rule 57 of the Federal Rules of Civil Procedure.

4. This Court is an appropriate venue for this cause of action pursuant to 28 U.S.C. Section 1391(b)(1) and (b)(2). The properties at issue are located in this judicial district; the actions complained of took place in this judicial district; documents and records relevant to the allegations are maintained in this judicial district; and the Defendants are present in and regularly conduct affairs in this judicial district.

PARTIES

5. Plaintiff incorporates by reference its allegation in Paragraph 1 above.

6. Defendant CITY AND COUNTY OF HONOLULU ("C&C") is a municipal corporation, and is legally responsible for the acts and omissions of its departments, officials and boards.

7. Defendant DEPARTMENT OF PLANNING AND PERMITTING OF THE CITY AND COUNTY OF HONOLULU (“DPP”) is the agency charged with enforcing zoning regulations on Oahu, pursuant to the Land Use Ordinance (“LUO”), Section 21 of the Revised Ordinances of Honolulu, specifically Sections 21-2.150-2.

8. Defendant GEORGE ATTA (“Director”) is, and at all relevant times was the Director of the DPP of the City and County of Honolulu, and, in performing his duties is and was, at all relevant times, acting under color of law. The Director is being sued in his official capacity.

9. The Director issues notices of violation to property owners, alleging that property is being used in violation of the LUO, including as an illegal transient vacation rental or bed and breakfast. If the Director determines that any person is not complying with a notice of violation, the Director may have the party responsible for the violation served with an order requiring the party to correct the violation within a given period of time, pay a civil fine not to exceed \$1,000 and/or to pay a civil fine up to \$1,000 per day for each day the violation persists. LUO Sec. 21-2.150-2(b)(1)(C-D). The LUO also provides that violation of its provisions can be prosecuted as a crime. No due process, or insufficient due process, is afforded a property owner before a notice of violation or notice of order is issued. Neither the DPP nor the Director provides to the property owner the

evidence or information upon which a notice of violation or notice of order is based.

10. Defendant HONOLULU ZONING BOARD OF APPEALS (“ZBA”) is a board of the City and County of Honolulu, which hears appeals from the actions of the Director of DPP in the enforcement of the LUO, and it is sued in its official capacity. Contrary to due process and the state administrative procedures act, the ZBA places the burden of proof and the burden of persuasion upon a property owner seeking to challenge the issuance of a notice of order by the Director, effectively forcing a property owner to prove that it did not violate the LUO, rather than requiring the Director to prove the violation.

11. John Does 1-99, Jane Does 1-99, DOE Entities 1-20, and DOE Governmental Units 1-10 (“Doe Defendants”) are sued herein under fictitious names for the reason that their true names, capacities and responsibilities are presently unknown to Plaintiffs despite diligent, good faith efforts to ascertain such identifying information, but on information and belief they are persons, entities, governmental agencies, and/or partnerships who are or were in some manner presently unknown to Plaintiffs engaged in the activities alleged herein; and/or are in some manner responsible for the injuries and damages to Plaintiff; and/or are persons who failed to fulfill a duty or obligation, which action, conduct, error or omission was the proximate cause of injuries or damages to Plaintiff’s members;

and/or were in some manner related to the party or parties that engaged in the activities alleged herein. Plaintiff will seek leave to amend this Complaint when the true names and capacities of the Doe Defendants have been ascertained.

INTRODUCTION

12. This is an action to vindicate Plaintiff's rights, Plaintiff's members' rights, and the rights of those similarly situated, to privacy, to property, to due process, and to protection from unreasonable searches and seizures under the Federal and Hawai'i constitutions.

13. The Hawaii Tourism Authority commissioned a study that estimated that there were in excess of 4,400 individually advertised vacation rental units (excluding hotel, timeshare, condominium hotel) on Oahu in 2014.

14. According to the Pacific Business News, an economic impact study prepared by Hospitality Advisors, LLC for Airbnb determined that in 2015, Airbnb guests spent more than guests of any other accommodations category in Hawaii, for a total of \$353 million, including an estimated \$23.8 million in transient accommodations tax and general excise tax revenue.

FACTUAL BACKGROUND

15. Plaintiff's members, and others similarly situated, own property in the City and County of Honolulu, State of Hawaii, and do, or desire to, offer their properties exclusively or partially for short term rental use and to do so

legally, in compliance with land use and tax laws.

16. Section 21-10.1 of the LUO provides “[t]ransient vacation unit’ means a dwelling or lodging unit which is provided for compensation to transient occupants for less than 30 days, other than a bed and breakfast home. For purposes of this definition, compensation includes, but is not limited to, monetary payment, services or labor of employees.”

17. Section 21-10.1 of the LUO further provides “[b]ed and breakfast home’ means a use in which overnight accommodations are provided to guests for compensation, for periods of less than 30 days, in the same detached dwelling as that occupied by an owner, lessee, operator or proprietor of the detached dwelling.”

18. Plaintiff’s members, and others similarly situated, do or desire to provide their properties (or portions thereof) as rentals to occupants for thirty days or more.

19. Plaintiff’s members, and others similarly situated, pay Transient Accommodation Tax and General Excise Tax for any and all income from their property rentals.

20. Under Hawaii’s Zoning Enabling Act, Haw. Rev. Stat. Ch. 46-1 et. seq., the C&C is required to designate a central coordinating agency and the DPP is the central coordinating agency. The central coordinating agency, among

other duties, must make knowledgeable personnel available to inform any person requesting information as to the applicability of land use and development laws.

21. Upon information and belief, Defendant DPP inspectors have entered private property to conduct “investigations,” without the property owners’ permission or consent, and Defendant DPP inspectors have confronted and harassed residents and guests concerning the LUO thirty-day rental provisions.

22. Upon information and belief, Defendant DPP inspectors have climbed over or entered through closed gates, ignored no trespassing signs, walked onto and around dwellings and entered private property from public beaches without permission of the property owner for the purpose of conducting investigations into alleged illegal rental activity and without a search warrant or court order allowing such a search.

23. Defendant DPP inspectors and other DPP officials have made representations to residents and guests, and to the public, including Plaintiff’s members, that guests must actually physically occupy the property for thirty days to be in compliance with the LUO. At other times, consistent with the LUO, DPP inspectors and officials have stated that physical occupancy is not required as long as the dwelling is provided exclusively to the guests for thirty days.

24. Consistent with the LUO, Defendant DPP inspectors and other DPP officials have made representations to residents and guests, and to the public,

including Plaintiff's members, that the LUO allows property owners up to twelve thirty-day rentals in a year. At other times, Defendant DPP inspectors and other DPP officials have made representations that repetitive thirty day rentals, with or without unit occupancy, is not in compliance with the LUO.

25. Defendant DPP inspectors have threatened to issue and issued notices of violation based on Plaintiff's members', and others similarly situated, provision of their property to guest for non-commercial purposes.

26. Upon information and belief, Defendants DPP inspectors have been acting with the knowledge and support of their supervisors within the DPP.

27. Upon information and belief, the Director has supported and encouraged the conduct of Defendant DPP inspectors.

28. These practices reflect Defendants' enforcement policy and are being communicated to Plaintiff's members and their agents together with notices of violation or threatened notices of violation.

29. These activities by DPP and the Director have created an atmosphere of fear and intimidation among property owners exercising their constitutional and statutory rights.

COUNT I
(Violation of Rights Secured By the U.S. Constitution)
42 U.S.C. § 1983

30. Plaintiff incorporates by this reference the foregoing paragraphs as if fully stated herein.

31. Defendants have threatened or actually issued notices of violation regarding the 30-day rule for Plaintiff's members' provision of their property for noncommercial use.

32. Upon information and belief, according to DPP, any occupancy, even noncommercial, for less than thirty days is a violation of LUO Section 21-10.1.

33. Upon information and belief, according to the DPP, advanced knowledge by a property owner that the guest will occupy the residence for less than thirty (30) days is a violation, or is evidence of a violation, even if the rental contract is for thirty (30) days and the property remains vacant for the remainder of the thirty (30) day term.

34. Upon information and belief, according to the DPP, the use of a pro rata fee or daily fee is a violation of the LUO, or evidence of a violation of the LUO, even if the rental contract is for thirty (30) days and the property remains vacant for the remainder of the thirty (30) day term.

35. Upon information and belief, according to the DPP, advertisement of a property for a rental period of less than thirty (30) days is a violation of the LUO, or evidence of a violation of the LUO.

36. The DPP's position is not supported by law and in fact contradicts the law.

37. The DPP's position infringes on Plaintiff's members' fundamental right to privacy by impairing their rights to invite social guests to one's home, overnight or otherwise.

38. The DPP has a pattern and practice of not disclosing the sources or bases for issuing a notice of violation.

39. The DPP affords no due process to a property owner before issuing a notice of violation or a notice of order.

40. To obtain due process, including reviewing the evidence supporting the issuance of the notice of violation and notice of order, the property owner receiving the notice of order must challenge the notice of order to the ZBA, which includes payment of a \$400 filing fee.

41. This requires Plaintiff's members to incur significant costs before even being provided with the evidence against them.

42. Upon appeal, the ZBA places the burden of proof on the property owner to demonstrate that he/she is not violating the LUO.

43. Upon appeal, the ZBA places the burden of persuasion on the property owner, rather than the DPP, to sustain or reverse a notice of order.

44. The payment of a filing fee, the shift of the burden of proof and burden of persuasion by the ZBA, the procedure which requires the property owner to file briefs and present evidence and witnesses before the Director, each and all deny due process, substantive and procedural, to the property owner, in violation of state law and the U.S. Constitution.

**COUNT II
(DECLARATORY RELIEF)**

45. Plaintiff incorporates by this reference the foregoing paragraphs as if fully stated herein.

46. An actual dispute exists between Plaintiff and Defendants within this Court's jurisdiction as to the exercise of Plaintiff's members' constitutional rights. Absent a declaration of Plaintiff's members' constitutional rights, Defendants will continue to violate their rights.

47. The Director has stated "[b]ecause Petitioners choose to receive compensation from others for occupancy of their property, they must comply with the minimum thirty days. Thus, the LUO allows a land owner to rent their property for thirty (30) day blocks, and, theoretically, may rent their property to separate individuals or party [sic] twelve times per year. The Director further interprets the LUO as not requiring that those renting for thirty (30) days be

required to actually occupy the dwelling for the full thirty (30) days.”

48. In addition the ZBA has stated “[t]he Director’s interpretation is that the LUO does not require that the renters actually occupy the dwelling for the full thirty days....”

49. Despite such statements, Defendants continue to take the position that property which is provided to paying guests for 30 days or more, but not occupied by all such guests for a continuous period of 30 days or more is contrary to law.

50. If Plaintiff’s members’ property, and that of those similarly situated, remains vacant during the 30 day time period for which it is provided but not occupied, such conduct is in compliance with the law.

51. As such, Defendants’ application and interpretation of LUO Section 21-10.1 is contrary to law.

52. Defendants have violated applicable laws, codes, ordinances, and/or regulations of the City and County of Honolulu and/or the State of Hawaii by issuing notices of violation where dwellings in residential districts are provided to paying guests for 30 days or more, but not occupied by all such guests for a continuous period of 30 days or more.

53. Therefore, the Plaintiff is entitled to a declaratory judgment that LUO Section 21-10.1, as applied and interpreted by Defendants, violates the

applicable laws, codes, ordinances, and/or regulations of the City and County of Honolulu, State of Hawaii, as well as such other and further relief as may follow from entry of such a declaratory judgment.

COUNT III
INJUNCTIVE RELIEF

54. Plaintiff realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

55. For reasons including but not limited to those stated in this Complaint, Plaintiff has no remedy by which to prevent or minimize the continuing irreparable harm to their constitutional rights.

56. Plaintiff, therefore, is entitled to a preliminary and permanent injunction prohibiting Defendants from violating the Plaintiff's constitutional rights, as well as such other and further relief as may follow from entry of such injunctive relief.

WHEREFORE, Plaintiff prays for judgment in its favor and against Defendants as follows:

- A. That judgment be entered in favor of Plaintiff and against Defendants;
- B. For appropriate declaratory relief regarding the unlawful and unconstitutional acts and practices of Defendants;

C. For an award of reasonable attorney's fees and their costs on their behalf expended as to such Defendants pursuant to the Civil Rights Act of 1871, 42 U.S.C. Section 1988; and

D. Costs;

E. For appropriate equitable relief against all Defendants as allowed by the Civil Rights Act of 1871, 42 U.S.C. Section 1983, including the enjoining and permanent restraining of these violations, and direction to Defendants to take such affirmative action as is necessary to ensure that the effects of the unconstitutional and unlawful patterns and practices are eliminated and do not continue to affect Plaintiff's members, or others' civil rights.

F. For such other and further relief as this court may deem appropriate, equitable, and just.

DATED: Honolulu, Hawaii, _____.

DAMON KEY LEONG KUPCHAK HASTERT

/s/ Gregory W. Kugle
GREGORY W. KUGLE
SOMMERSET K.M. WONG

Attorneys for Plaintiff